91-479

No. 91-

In the Supreme Court of the United States

October Term, 1991

COMMONWEALTH OF MASSACHUSETTS,
Petitioner

v.

EARL J. REOPELL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the Commonwealth's Eleventh Amendment immunity from prejudgment interest on a retrospective damages award clearly and unequivocally abrogated when Congress enacts a statute authorizing the courts only to "compensate . . . for any loss of wages or benefits"?

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

The Commonwealth of Massachusetts petitions for a writ of certiorari to review the judgment of the First Circuit Court of Appeals in this case.

OPINION BELOW

The opinion of the First Circuit Court of Appeals is reported at 936 F.2d 12 and is reproduced as Appendix A hereto. The decisions of the United States District Court are unreported and

are reproduced as appendices B through E hereto.

JURISDICTION

The judgment of the First Circuit Court of Appeals was entered on June 18, 1991. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257 (1988 ed.). The District Court had jurisdiction under 28 U.S.C. § 1331 and 38 U.S.C. § 2022.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

38 U.S.C. § 2022 (Supp. 1991) provides, in pertinent part:

> If any employer, who is a private employer or a State or political subdivision thereof, fails or refuses to comply with the provisions of section 2021(a), (b)(1), or (b)(3), or 2024 of this title, the district court of the United States . . . shall have the power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action.

STATEMENT OF THE CASE

The plaintiff is a state police officer who violated, then challenged, a state police rule prohibiting officers from joining a federal or state military organization without permission.[1/] His suit arose under

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1/ At the time Reopell was disciplined, it was unsettled whether a state police force could prohibit its officers from joining the military reserves without permission. Cf. Boyle v. Burke,

(footnote continued)

the Veteran's Reemployment Rights Act ("VRRA"), 38 U.S.C. §§ 2021 et seq. The Commonwealth argued that the Rule was not preempted by the VRRA under the strict standards that apply under the Supremacy Clause (App. E-18).

Upon stipulated facts, the District Court allowed the plaintiff's motion for summary judgment on liability, and

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(footnote continued)

925 F.2d 495, 500 (1st Cir. 1991); Hughes v. Frank, 414 F.Supp. 468 (E.D.N.Y.) aff'd, 551 F.2d 300 (2d Cir. 1976), cert. denied, 430 U.S. 968 (1977). The rule in question, State Police rule 10.83, read:

> Members of the Uniformed Branch are prohibited from joining any federal or state military organization without permission of the Commissioner except that the Massachusetts National Guard may be joined without written permission.

(App. A-3).

denied the Commonwealth's cross-motion for judgment (App. D-18 to 19).

The parties filed a stipulated proposed judgment that resolved all issues except for prejudgment interest (App. A-5). Under the judgment, the plaintiff was due "$3,260.41 as lost wages resulting from plaintiff's suspension from State Police duties for the period May 1, 1985 to May 30, 1985." (App. C-1 to 2).[2/]

The stipulation left open the issue whether, as a matter of law, the defendant should pay prejudgment interest to plaintiff on the back wages set forth in the judgment (App. B-2). In the event that prejudgment interest were awarded, the parties agreed that

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2/ The rest of the judgment concerned injunctive relief that is not at issue in this petition (App. C-2 to 6).

the amount was $1,788.01 (id.).

The parties submitted cross motions for summary judgment on the prejudgment interest issue (App. B-2 to 3). On September 7, 1990, the District Court (Freedman, C.J.) ruled that the Commonwealth was not liable for prejudgment interest and entered judgment to that effect (App. B-8 to 9). The Court held that the Eleventh Amendment provided the Commonwealth with immunity from suit for prejudgment interest under the VRRA because "the Act does not express any intent that states be liable for prejudgment interest." (App. B-5). Tracking the language of the statute, the Court noted that "section 2022 does allow the plaintiff to recover lost wages and benefits from a state, but there is no 'clear affirmative intent of Congress to waive

the sovereign's immunity' regarding prejudgment interest. Library of Congress v. Shaw, 478 U.S. at 321." (App. B-7).

The First Circuit Court of Appeals reversed. The Court acknowledged that two of its prior decisions had relied upon Library of Congress v. Shaw, 478 U.S. 310 (1986) in holding that a general abrogation of state immunity from suit did not suffice to waive immunity from prejudgment interest. (App. A-11, citing WJM, Inc. v. Massachusetts Department of Public Welfare, 840 F.2d 996, 1006 (1st Cir. 1988); Rogers v. Okin, 821 F.2d 22, 26-28 (1st Cir. 1987), cert. denied, 484 U.S. 1010 (1988)). The First Circuit, however, reexamined its position in light of dicta in an intervening case, Missouri v. Jenkins, 491 U.S. 274, 281,

n.3 (1989). Based upon the dicta (quoted below, pp. 21-22, n.8), the Court held "that interest is includable if, under normal litigation principles and rules of statutory construction, a court could have been expected to allow prejudgment interest on the underlying recovery." (App. A-15). After a long discussion of whether the VRRA abrogated state Eleventh Immunity from damage awards -- which the Court noted was not a contested issue -- the Court held:

> While . . . Congress did not expressly provide for the inclusion of prejudgment interest in an award under the VRRA, such interest has commonly been implied by the courts as being necessary to carry out Congress' purpose to make a veteran whole.

(App. A-25). The Court reversed and remanded with directions to enter an order awarding prejudgment interest to the plaintiff. (App. A-26).

REASONS FOR GRANTING THE WRIT

THE PETITION SHOULD BE GRANTED TO RESOLVE AN IMPORTANT AND UNSETTLED ISSUE OF FEDERALISM.

This case raises serious questions regarding the relationship between the sovereign states and the federal government under the Eleventh Amendment to the United States Constitution.[3/] As the Court below recognized, "this dispute takes on a serious cast because it is in an area that currently divides the Supreme Court, and as to which the Court's opinions provide unsteady

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3/ The award of prejudgment interest here upon a back pay award falls squarely within the protection of the Eleventh Amendment, as it involves payment from the state treasury for retrospective relief. "[A] suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." Edelman v. Jordan, 415 U.S. 651, 663 (1974).

guidance." (App. A-9). A dispute of this nature and gravity should be resolved by this Court, rather than by a circuit court, acting upon what it termed "unsteady guidance."

1. This Case Raises Important Federalism Issues Concerning The Eleventh Amendment And State Sovereignty.

This case presents the issue whether a mere inference based upon statutory policy is enough to abrogate the states' constitutional immunity from prejudgment interest on a back pay award. If so, then the states' immunity from prejudgment interest is unlike their immunity from damage awards and the federal government's sovereign immunity.

The "significance of [the Eleventh] Amendment 'lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial

authority in Art. III' of the Constitution." Atascadero State Hospital v. Scanlon, 473 U.S. 234, 238 (1985), quoting Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 98 (1984).

While Congress can abrogate the Eleventh Amendment without the states' consent,[4/] this extraordinary power amendment is not exercised by Congress lightly. Abrogation of the state's sovereign immunity upsets "the fundamental constitutional balance" between the states and the federal government and severely strains the principles of federalism that

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4/ In Pennsylvania v. Union Gas, 491 U.S. 1, 14-19 (1989), for example, the Court ruled that Congress had abrogated Eleventh Amendment immunity under the Article I Commerce Clause powers.

underlie the Eleventh Amendment. Dellmuth v. Muth, 491 U.S. 223, 227 (1989).

In particular "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." Atascadero, supra, 473 U.S. at 242 (emphasis added). See Dellmuth, supra, 491 U.S. at 230 (1989) ("in this area of law, evidence of congressional intent must be both unequivocal and textual.") (emphasis added). See also, Blatchford v. Native Village of Noatak and Circle Village, 111 S.Ct. 2578, 2584-86 (1991).

The parties here dispute whether this clear statement doctrine applies to the imposition of pre-judgment interest whenever awards of back pay against the

states are authorized.

Here, there has been no statement whatsoever from Congress -- let alone a clear statement -- that the states are to be liable for prejudgment interest in VRRA cases. The VRRA does not award "compensation" generally, but only states that the Court has the power to "compensate . . . for any loss of wages or benefits . . ." 38 U.S.C. §2022 (emphasis added). This says nothing above prejudgment interest. It cannot be a clear statement as to separate elements of damages such as prejudgment interest.

Indeed, in the case of private employers, prejudgment interest has been awarded under the VRRA based upon, at most, an implication from the statutory policy. Hanna v. American Motors Corp., 724 F.2d 1300, 1311 (7th Cir.), cert.

denied, 467 U.S. 1241 (1984); Hembree v. Georgia Power Co., 637 F.2d 423, 430 (5th Cir. 1981). Chernoff v. Pandick Press, Inc., 440 F.Supp. 822, 827 (S.D.N.Y. 1977). An implication is not an "unequivocal and textual" abrogation by Congress. See Dellmuth, supra.[5/]

Issues concerning the States' liability for prejudgment interest have arisen in a number of contexts other than the present one.[6/] For instance,

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5/ Legislative history is irrelevant, since legislative history is not "textual". Id. In addition, none of the legislative history cited by the First Circuit addresses the question of prejudgment interest in any way.

6/ The Commonwealth does not suggest that there is a split among the circuit courts. In Pegues v. Mississippi State Employment Service, 899 F.2d 1449 (5th Cir. 1990), the Fifth Circuit, unlike the First Circuit, concluded that the

(footnote continued)

such issues have occurred in the context of the Bankruptcy Act. 11 U.S.C. §§106(a). WJM, supra (overruled by the Court below in this case); Texaco, Inc. v. Louisiana Land and Exploration Co., 113 B.R. 924 (M.D. La. 1990); Cf. Hoffman v. Connecticut Department of Income Maintenance, 492 U.S. 96 (upholding immunity for all purposes when a state has not filed a proof of claim, under 11 U.S.C. § 106(c)).

(footnote continued)

issue of the states' immunity from prejudgment interest has not been resolved by dictum in Library of Congress v. Shaw, supra. However, the Fifth Circuit held that Congress had abrogated that immunity under Title VII. The fact that two Circuits have found abrogations where Shaw would grant immunity to the federal government suggests the need for this Court to decide the issue, if the states' rights are to be preserved.

Similarly, Title VII of the Civil Rights Act of 1964 has been the source of litigation over prejudgment interest. Pegues, supra; Cf. Shaw, supra (discussing federal government's immunity from prejudgment interest).

Substantial sums of money may be involved in these types of disputes. Pegues, for example, involved over $2,873,000, which included back pay and at least four years of prejudgment interest. Rogers, supra, though addressing attorneys fees (which were later held not subject to the Eleventh Amendment), involved prejudgment interest alone amounting to $575,000.

In short, the questions raised by the decision below implicate important issues of federalism that should be resolved by this Court. When a circuit

court applies an erroneously low standard in finding abrogation, the "States are unable directly to remedy a judicial misapprehension of that abrogation . . .". Port Authority Trans-Hudson Corp. v. Feeney, 110 S.Ct. 1868, 1872 (1990). Only this Court can reestablish the proper state-federal balance.

2. The Circuit Court Below Misinterpreted The Application of Shaw And Jenkins To The State's Immunity.

This case also squarely raises the question whether the States are afforded the same or similar immunity from prejudgment interest awards as the federal government enjoys under Shaw, supra.

Shaw reiterated the rule "that interest cannot be recovered unless the award of interest was affirmatively and

separately contemplated by Congress." Id., 478 U.S. at 315. Recognizing that the courts "must construe waivers strictly in favor of the sovereign," Shaw applied "an added gloss of strictness" that is virtually identical to the clear statement doctrine under the Eleventh Amendment:

> "[T]here can be no consent by implication or by use of ambiguous language. Nor can an intent on the part of the framers of a statute or contract to permit the recovery of interest suffice where the intent is not translated into affirmative statutory or contractual terms. The consent necessary to waive the traditional immunity must be express, and it must be strictly construed."

Id., 478 U.S. at 318, quoting United States v. N.Y. Rayon Importing Co., 329 U.S. 654, 659 (1947).

Finding that the statute at issue "contains no reference to interest," the Shaw Court held that "congressional silence" did not permit reading the statute

to waive sovereign immunity with respect to interest. Id., 478 U.S. at 319. The Court relied upon the general principle that "interest is an element of damages separate from damages on the substantive claim." Id., 478 U.S. at 314, citing C. McCormick, Law of Damages, § 30, p. 205 (1935). The principles set forth in Shaw for abrogating federal immunity apply equally to state immunity. Under the principles enunciated by this Court, interest is still a separate element from a "loss of wages or benefits," for which recovery is authorized by the statute involved in this case, 38 U.S.C. § 2022.

Moreover, in the VRRA, the federal and state liability provisions[7/] have identical wording, and neither statute even mentions interest. It is unlikely that

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7/ 38 U.S.C. §§ 2022, 2023.

Congress, as protector of both the states' Eleventh Amendment immunity and the federal government's sovereign immunity, intended identical language to abrogate one form of immunity but not the other. Moreover, there is nothing in the Constitutional plan that suggests that Congress need be less aware of consequences of legislation that abrogates the states' constitutionally based rights than when it waives federal sovereign immunity.

The First Circuit read this Court's dicta in Jenkins, supra[8/] as requiring

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8/ In discussing Shaw, a footnote of the majority opinion noted, among other things, that:

> [The no-interest] rule which is applicable to the immunity of the United States and is therefore not at issue here, provides an "added gloss of strictness" . . . only where the United States' liability for interest is at

(footnote continued)

the lower federal courts to rule that Congress abrogated state sovereign immunity and Eleventh Amendment immunity as to interest, even if Congress enacted

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(footnote continued)

> issue . . . Shaw thus does not represent a general-purpose definition of compensation for delay that governs here. Outside the context of the "no-interest rule" of federal immunity, we see no reason why compensation for delay cannot be included within § 1988 attorney's fee awards, which Hutto held to be "costs" not subject to Eleventh Amendment strictures. Jenkins, supra, 491 U.S. at 281, n.3

This footnote was carefully limited to the situation actually before the Court. It contrasted the Shaw situation (where federal sovereign immunity did apply) with the award of attorney's fees ancillary to prospective relief, where Jenkins and Hutto hold that the Eleventh Amendment simply does not apply at all. The third situation -- where the state's sovereign immunity applies -- was, quite properly, not discussed in footnote 3.

The Fifth Circuit's decision in Pegues, supra, agreed, contrary to the First Circuit, that Jenkins does not address the third situation.

a statute expressly authorizing only compensation for wages and benefits. In fact, Shaw did not address a situation in which the Eleventh Amendment applied at all. Rather, it held that, because the attorneys fees in question under 42 U.S.C. §1988 were ancillary to the award of prospective relief, the Eleventh Amendment was completely inapplicable. There was no occasion to consider whether Congress had abrogated Eleventh Amendment immunity, or whether Congress had spoken with sufficient clarity in the text of the statute on the issue.

There is no principled reason why Shaw would apply only to the federal government's immunity but not to the

Commonwealth's.[9/] This Court should address this issue directly to settle the meaning and status of the dicta in Shaw, particularly where the decision below is inconsistent with the Constitutional scheme and this Court's Eleventh Amendment jurisprudence. The First Circuit's dramatic restructuring of federal-state relations calls for

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9/ The principles of "sovereign immunity" are not limited to the federal government, but apply also to the states. See Pennhurst, supra, 465 U.S. at 98 (the Eleventh Amendment's "greater significance lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III") (emphasis added). Atascadero, supra, 473 U.S. at 242 ("By guaranteeing the sovereign immunity of the states against suit in federal court, the Eleventh Amendment serves to maintain" the "balance" of power between the states and the federal government) (emphasis added). Dellmuth, supra, 109 S.Ct. at 2400 ("abrogation of sovereign immunity upsets 'the fundamental constitutional balance between the federal government and the states'" [citing Atascadero] (emphasis added).

review by this Court.

CONCLUSION

For the foregoing reasons, the provision for a writ of certiorari should be granted.

Respectfully submitted,

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A P P E N D I C E S

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 90-1989

EARL J. REOPELL
Plaintiff, Appellant,

v.

COMMONWEALTH OF MASSACHUSETTS
Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Frank H. Freedman,
U.S. District Judge]

Before

Campbell, Circuit Judge,

Aldrich, Senior Circuit Judge,

and Cyr, Circuit Judge.

Jonathan R. Siegel, Appellate Staff, Civil Division, Department of Justice, with whom Stuart M. Gerson, Assistant Attorney General, Wayne A. Budd, United States Attorney, and Michael Jay Singer, Appellate Staff, Civil Division,

Department of Justice, were on brief for appellant.

Douglas H. Wilkins, Assistant Attorney General, with whom Scott Harshbarger, Attorney General, was on brief for appellee.

June 18, 1991

CAMPELL, Circuit Judge. Earl J. Reopell, whose rights under the Veteran's Reemployment Rights Act (VRRA), 38 U.S.C. § 2021 et seq., were violated by the Commonwealth of Massachusetts, appeals from the denial of prejudgment interest on the compensation awarded to him by the district court. The only issue is whether, as part of compensatory damages under the VRRA, states found to have violated the VRRA and held liable for back pay and other damages may also, consistent with the Eleventh Amendment,

be charged with prejudgment interest on the award. Recent Supreme Court pronouncements persuade us that a state should be so charged with interest in these circumstances.

I.

The facts are not in dispute: In 1983 Earl J. Reopell was a Massachusetts State Police Trooper. State Police Regulation 10.83, then in force, provided that "[m]embers of the Uniformed Branch are prohibited from joining any federal or state military organization without permission of the Commissioner, except that the Massachusetts National Guard may be joined without written permission." On November 10, 1983, Reopell sought the Commissioner's permission to join the United States Army Reserve. Permission was denied, but Reopell nonetheless

enlisted in the Army Reserve on December 15, 1984. On or about January 1, 1985, he informed his superior officer in the State Police, Captain Gilman, of his enlistment. In March 1985, Captain Gilman informed Reopell that charges were being drawn against him for violation of Massachusetts State Police Regulations 10.83 and 10.21 (disobeying orders). Reopell waived his right to a hearing and accepted as punishment a thirty-day suspension without pay. Captain Gilman also ordered Reopell to resign from the Army Reserve. Reopell was suspended without pay for the thirty-day period beginning April 30, 1985. As a result, he lost pay and also vacation time, sick leave, and seniority.

Reopell, represented by the United States Attorney General, brought an action in the district court against the

Commonwealth of Massachusetts. The court found that the Commonwealth had violated Reopell's rights under the VRRA. The parties thereupon stipulated to the entry of a judgment providing that Reopell would be paid $3,260.41 on account of wages lost because of his suspension; would be credited with lost vacation; and would have his seniority restored. The Massachusetts State Police were also directed to rescind and declare null and void the order requiring Reopell to resign from the Army, and were to publish a comprehensive order to the effect, inter alia, that the court had found such policies to violate the VRRA and had enjoined them. The case was thus settled at the remedy stage by agreement on all matters except one.

The one disputed issue remaining was whether Massachusetts should be ordered to pay prejudgment interest to Reopell on the monetary award. The parties stipulated that if an award of interest were appropriate, the amount due would be $1,788.01 as of February 28, 1990, with further interest at a rate of 8%. The parties each moved for summary judgment on the question of interest. Massachusetts insisted that its Eleventh Amendment immunity prohibited the court from directing it to pay interest to Reopell.[1/]

In a September 7, 1990 Memorandum and Order, the district court granted the Commonwealth's motion for summary

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1/ The Commonwealth relies on Edelman v. Jordan, 415 U.S. 651, 663 (1974) ("[a] suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.")

judgment and denied Reopell's motion. The court concluded that, although prejudgment interest "was properly awarded under the Act, in the interest of reimbursing the veteran" (citing cases awarding interest under the VRRA against private employers), the Eleventh Amendment precluded the recovery of prejudgment interest from a state in similar cases.

On appeal, Reopell argues that the Veteran's Reemployment Rights Act itself plainly abrogates the states' Eleventh Amendment immunity against payment of retroactive compensation for violation of the Act. He contends that once Congress has so abrogated a state's Eleventh Amendment immunity by an unequivocally clear statement, a court need only be satisfied that interest is payable on the underlying award under

ordinary principles in order to permit the inclusion of interest in the overall award against the state. Under this theory, interest may be imposed here notwithstanding the Eleventh Amendment, since the Veteran's Reemployment Rights Act, as customarily interpreted, implies the addition of prejudgment interest to a compensatory award in order to make the injured reservist or veteran whole.

Massachusetts responds that abrogation of the Commonwealth's Eleventh Amendment immunity against payment of interest can occur only as the result of an unequivocal statutory statement pertaining specifically to interest. Congress, the Commonwealth points out, did not in so many words abrogate the states' Eleventh Amendment immunity against interest awards under the VRRA.

II.

While seemingly minor, this dispute takes on a serious cast because it is in an area that currently divides the Supreme Court, and as to which the Court's opinions provide unsteady guidance. There are really two related questions: (1) whether an award of back pay and related monetary damages is ever recoverable under the VRRA from a state (absent agreement, as here) given the Eleventh Amendment; (2) if recoverable, is prejudgment interest thereon recoverable. Reversing logical order, we turn first to the recoverability of interest.

In 1986 the Supreme Court addressed the question of when and whether the United States is subject to payment of prejudgment interest on awards against it. In Library of Congress v. Shaw, 478

U.S. 310 (1986), the Court held that although interest on attorney's fees is recoverable in a Title VII action against a private employer, it is not recoverable when the defendant is the United States.[2/] The Court relied on the traditional "no-interest rule," under which the "sovereign" is immune from an award of interest except to the extent that it has separately waived its immunity against interest. The Court held that Congress' general waiver of immunity from suit is not sufficient to

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2/ In Shaw, the plaintiff prevailed against the federal government in a race discrimination suit under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e et seq. He sought and obtained an award of attorney's fees in the district court, with an upward adjustment of 30% to compensate for delay in payment. The court held that the upward adjustment was equivalent to an impermissible award of interest upon the attorney's fees. 478 U.S. at 321-323.

waive immunity from interest, because interest is an element of damages separate from damages on the substantive claim. 478 U.S. at 314. Following the Court's decision in Shaw, this circuit has suggested that the "no-interest rule" also applies, at least to some degree, to actions against states, which are shielded by sovereign immunity under the Eleventh Amendment. WJM, Inc. v. Massachusetts Department of Public Welfare, 840 F.2d 996, 1006 (1st Cir. 1988); Rogers v. Okin, 821 F.2d 22, 26-28 (1st Cir. 1987), cert. denied, 484 U.S. 1010 (1988). While expressing some dissatisfaction in Rogers, 821 F.2d at 28, we concluded in light of Shaw that the Eleventh Amendment forbade prejudgment interest on a belated attorney's fee award made under 42 U.S.C. § 1988 against a state. Since

Shaw, it has been our view that an award of prejudgment interest against a state is invalid unless the state itself has waived its immunity with respect to such an award, or Congress has expressly indicated its intention to subject states to this element of damages. WJM, Inc., 840 F.2d at 1006.

Recent Supreme Court developments, however, require us to reexamine our position. In 1989, the Supreme Court considered whether the Eleventh Amendment prohibited the enhancement of an attorney's fee award against a state to compensate for delay in payment. Missouri v. Jenkins, 109 S. Ct. 2463 (1989). The court held it did not, primarily on the ground that attorneys' fees were not retroactive payments barred by the Eleventh Amendment. In a footnote, however, Justice Brennan,

writing for five justices, expressly limited the Court's holding in Shaw to the "special 'no-interest rule' . . . applicable to the immunity of the United States . . . ." 109 S. Ct. at 2468, note 3. The footnote went on to deny the "existence of an equivalent rule relating to state immunity that embodies the same ultra-strict rule of construction for interest awards that has grown up around the federal no-interest rule." Id. Significantly, in her dissent joined by only two other justices, Justice O'Connor cited approvingly this circuit's decision in Rogers v. Okin, wherein we extended the no-interest rule mentioned in Shaw to the states. Jenkins, 109 S. Ct. at 2475. While footnote 3 in Jenkins is arguably dicta, and while it is by no means clear that the dispute in the

Supreme Court over the reach of the Eleventh Amendment has been finally resolved, a circuit court is not at liberty to turn its back on the Court's majority pronouncements. That the dissent took issue with the footnote, serves only to strengthen the latter by reducing the likelihood that the five justices overlooked the language of the footnote when signing on. We believe, therefore, that there is no longer any strict requirement that prejudgment interest necessarily be expressly sanctioned by Congress in order to be recoverable in an action against a state brought pursuant to a federal statute - provided, of course, the Eleventh Amendment has been effectively abrogated by Congress in respect to the underlying damages award. Contrary to our prior holdings in Rogers, 821 F.2d 22, and

WJM, Inc., 840 F.2d 996, we now hold that interest is includable if, under normal litigation principles and rules of statutory construction, a court could have been expected to allow prejudgment interest on the underlying recovery. Accord Pegues v. Mississippi State Employment Service, 899 F.2d 1449, 1454 (5th Cir. 1990).

This conclusion leads us back to the first question posed - a question that was not actually decided below - namely, does the Eleventh Amendment allow recovery against a state for back pay and related damages under the VRRA? The state defendant here stipulated to the entry of a judgment which included lost wages. By so capitulating it mooted, as a practical matter, this issue, leaving in dispute only the availability of interest on that judgment. But if

compensatory actions against states under the VRRA are, in fact, barred by the Eleventh Amendment, so too is the interest on any award. It is relevant to our interest analysis, therefore, whether the private compensatory actions against states provided by the VRRA run afoul of the Eleventh Amendment. A leading circuit holding on this point is that of the Fifth Circuit in Peel v. Florida Dept. of Transportation, 600 F.2d 1071, 1073 (1979). The court in Peel held that the VRRA, enacted by Congress under its War Powers, U.S. Const. art. I, § 8, abrogated the Eleventh Amendment. While the extent of Congress' power to abrogate the Eleventh Amendment continues to divide the Court, its recent 5-4 decision in Pennsylvania v. Union Gas Co., 109 S. Ct. 2273 (1989) gives powerful and near-conclusive

support to Peel, which is cited approvingly by Justice Brennan writing for the majority. Id. at 2281. The battle may not yet be ended, but we are constrained to accept the Court's majority pronouncements. The VRRA, to be sure, was not enacted under the Commerce Clause, the focus of Union Gas. But the Court's rationale for holding that Commerce Clause enactments abrogate the Eleventh Amendment equally supports War Power abrogation. It follows that passage of the VRRA - assuming Congress expressed its intention to abrogate with adequate clarity - removed the Eleventh Amendment bar to damages actions brought under the Act against a state. Accord Jennings v. Illinois Office of Education, 589 F.2d 934, 937-38 (7th Cir. 1979).

The relevant section of the VRRA, as codified in 38 U.S.C. § 2022, reads:

> If any employer, who is a private employer or a State or political subdivision thereof . . . fails or refuses to comply with the provisions of [the Act] . . . the district court for the United States . . . shall have the power . . . to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. . . .

(Emphasis added.) This language was adopted by Congress in 1974, in an amendment that expanded veterans' reemployment rights beyond private employees to include those employed by state and local governmeents.[3/] Act of Dec. 3, 1974, Pub. L. No. 93-508, 88

3/ The current version of the statute is very similar to what emerged in 1974. Two amendments have since been made, one in 1982 and one in 1984; neither of them is relevant to this case.

Stat. 1594 (codified at 38 U.S.C. § 2021-26 (1976)). In enlarging the scope of the statute, we think Congress made its intention "unmistakably clear" to enforce compensatory actions against the states and their political subdivisions. See Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985) ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute."). The final Congressional conference report stated that "[b]oth the Senate and House amendments provide for the codification into title 38 of existing law on veterans' reemployment rights, and further extends such rights to veterans who were employed by States or their political subdivisions." Joint

Explanatory Statement of the Committee on Conference, S. Conf. Rep. No. 93-1240, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 6336, 6344.

VRRA compensatory relief is thus available against a state notwithstanding the Eleventh Amendment. Congress did not, to be sure, expressly mention prejudgment interest as an element of such relief. The statute, however, expressly empowers the court to require an employer, including specifically a state, "to compensate [the injured employee] for any loss of wages or benefits suffered by reason of such employer's unlawful action." 38 U.S.C. § 2022 (emphasis supplied). To fully compensate for past-due wages would seem to require awarding interest. Recognizing this, courts have

regularly interpreted the VRRA as authorizing the award of prejudgment interest against offending private employers. See Hanna v. American Motors Corp., 724 F.2d 1300, 1311 (7th Cir. 1984) (trial judge's discretion in awarding prejudgment interest must be guided by the principle of making whole a returning veteran under the Vietnam Era Veteran's Readjustment Assistance Act), cert. denied, 467 U.S. 1241 (1984); Hembree v. Georgia Power Co., 637 F.2d 423, 429-430 (5th Cir. 1981) (awarding prejudgment interest under the VRRA, since it is clear that plaintiff was deprived of reemployment rights explicitly granted to him by Congress, and the only way he could be made whole is by awarding him prejudgment interest). It is significant that prejudgment interest was granted against

private employers before the 1974 amendments as well as subsequently. Helton v. Mercury Freight Lines, Inc., 444 F.2d 365 (5th Cir. 1971); Accardi v. Pennsylvania Railroad Company, 369 F.2d 805 (2d Cir. 1966). It is, therefore, reasonable to believe that when Congress enacted the 1974 amendments to the VRRA, extending to veterans the same reemployment rights and remedies against states as against private employers, it intended to subject states to the same relief as private employers. In a single sentence, the VRRA provides identical remedies against private and state employers: "[i]f any employer, who is a private employer or a State or political subdivision thereof," violates the Act, a district court may order the employer to "compensate" the injured party. The view that the remedies

available against a private employer were to be the same as those against a state employer is further supported by the Senate Report to the 1974 amendments to the VRRA, which states, with specific regard to the remedy section, § 2022:

> In addition to recodifying existing law, this section extends to employees of State and local governments and other political subdivisions enforcement rights in the same manner and to the same extent as are currently provided for employees of private employers, including the specific right to have their legal rights litigated in the Federal courts.

S. Rep. No. 93-907, 93d Cong., 2d Sess. 109, 110 (1974).

The rationale behind granting prejudgment interest has been that "[i]nterest is a proper ingredient of the instant 'make whole' remedy and should be granted. Prejudgment interest is viewed as effectuating the purposes of the Act, particularly that of

encouraging reemployment of veterans . . . at the earliest opportunity." Peel v. Florida Dept. of Transp., 500 F. Supp. 526, 528 (N.D. Fla. 1980) (citing cases). This has been the general interpretation of most courts, leading many of them to award interest even in actions against states. See Thomas v. City & Borough of Juneau, 638 F. Supp. 303, 307-308 (D. Alaska 1986); Adams v. Mobile County Personnel Board, 115 L.R.R.M. (BNA) 2936, 1982 WL 1972 (S.D. Ala. 1982); Griffin v. Tunica County Schools, 112 L.R.R.M. (BNA) 2167, 1982 WL 1966 (N.D. Miss. 1982); Green v. Oktibbeha County Hospital, 526 F. Supp. 49, 56 (N.D. Miss. 1981); Peel v. Florida Dept. of Transp., 500 F. Supp. 526; but cf. Micalone v. Long Island R. Co., 582 F. Supp. 973, 980 (S.D.N.Y. 1983) (in suit brought under VRRA,

successful plaintiff made whole by award of back pay and reimbursement only).

While, therefore, Congress did not expressly provide for the inclusion of prejudgment interest in an award under the VRRA, such interest has commonly been implied by the courts as being necessary to carry out Congress' purpose to make a veteran whole. We accordingly conclude that, by its express direction in the VRRA to "compensate" persons for any unlawful loss of wages or benefits caused by state employers, Congress intended to empower courts to award prejudgment interest. It follows, under the Supreme Court's recently expressed views in Jenkins and Union Gas, supra, that the states are not shielded by the Eleventh Amendment from paying such make-whole compensation including interest.

The district court expressed agreement "with the plaintiff's contention that prejudgment interest is properly awarded under the Act, in the interest of reimbursing the veteran." However, it understandably felt constrained to deny interest in light of Shaw and pre-Jenkins Eleventh Amendment precedent, including our own. As this precedent must now give way to Jenkins' limitation of Shaw to suits against the United States, we reverse and remand with directions that the district court enter an appropriate order awarding prejudgment interest, in the correct amount, to plaintiff.

So ordered. Costs to appellant.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

EARL J. REOPELL,	)	
Plaintiff,	)	
v.	)	C. A. NO. 87-0066-F
COMMONWEALTH OF MASSACHUSETTS,	)	
Defendant.	)	

MEMORANDUM AND ORDER

September 7, 1990

FREEDMAN, C.J.

This matter arises from a violation by the Commonwealth of Massachusetts ("the Commonwealth") of rights guaranteed to plaintiff Earl J. Reopell by the Vietnam Era Veterans' Readjustment Act ("the Act"), 38 U.S.C.

§ 2021 et seq. The parties agreed that pursuant to 38 U.S.C. § 2022 ("section 2022"), the Commonwealth would pay the plaintiff $3,260.41 for lost wages for the period May 1, 1985 to May 30, 1985. A judgment was entered by this Court for that amount.

On April 3, 1990, the Commonwealth and the plaintiff stipulated that the only remaining issue in this case was the matter of prejudgment interest. The parties agreed that if this Court determined that an award of prejudgment interest is warranted, the amount to be paid by the Commonwealth through February 28, 1990 would be $1,788.01, with additional interest accruing at the rate of 8% annually.

On April 17, 1990 the plaintiff, who is represented by the United States Attorney pursuant to section 2022, filed

a Motion for Summary Judgment seeking an award of prejudgment interest. The Commonwealth filed a Cross-Motion for Summary Judgment on April 25, 1990. Having determined that prejudgment interest may not be granted in this case, the Court will now deny the plaintiff's motion and grant the Commonwealth's cross-motion.

II. DISCUSSION

The Court is in agreement with the plaintiff's contention that prejudgment interest is properly awarded under the Act, in the interest of reimbursing the veteran. Hanna v. American Motors Corp., 724 F.2d 1300, 1311 (7th Cir.) (defendant was private employer), cert. denied, 467 U.S. 1241 (1984); Hembree v. Georgia Power Co., 637 F.2d 423 (5th Cir. 1981) (defendant was private employer); Brown v. Consolidates Rail

Corporation, 614 F.Supp. 289, 291 (N.D. Ohio 1985) (defendant was government chartered corporation); Ryan v. City of Philadelphia, 559 F.Supp. 783, 784, 787 (E.D. Pa. 1983) (defendant was municipal corporation chartered by the state), aff'd., 732 F.2d 147 (3d Cir. 1984). However, the Court also agrees with the Commonwealth's contention that the Eleventh Amendment to the United States Constitution precludes recovery of prejudgment interest from a sovereign state which is found to have violated the act.

The plaintiff relies on Peel v. Florida Department of Transportation, 500 F.Supp. 526, 528 (N.D. Fla. 1980), in which the district court found that Florida law could not preclude an award of prejudgment interest on a monetary award arising from a state agency's

violation of the Act. While the district and appeals court in Peel had earlier rejected the notion that the Eleventh Amendment would shield the state from liability under the Act, Peel v. Florida Department of Transportation, 443 F.Supp. 451 (N.D. Fla. 1977), aff'd., 600 F.2d 1070 (5th Cir. 1979), the courts did not consider the Eleventh Amendment's applicability to prejudgment interest. See also, Comacho v. Public Service Commission, 450 F.Supp. 231 (D.P.R. 1978) (Commonwealth is liable for damages under the Act, despite Eleventh Amendment sovereign immunity).

In the instant case, the Act does not express any intent that states be liable for prejudgment interest. "In the absence of express congressional consent to the award of interest separate from a general waiver of

immunity to suit, the United States is immune from an interest award." Library of Congress v. Shaw, 478 U.S. 310, 314 (1986) (no-interest rule precludes increased compensation for delay in payment of attorney fees pursuant to Civil Rights Act of 1964). Likewise, a clear abrogation of a state's sovereign immunity by Congress is also required in order to make a state subject to suit. Dellmuth v. Muth, 105 L.Ed. 181, 187-88 (1989); Atascadero State Hospital v. Scanlon, 473 U.S. 234, 243 (1985). See also Rogers v. Okin, 821 F.2d 22, 27-28 (1st Cir. 1987) ("neither the statutory language nor the legislative history gives any basis for an inference that Congress actually intended to remove the states' Eleventh Amendment immunity from substantial sums of prejudgment interest on attorneys' fee awards"), cert denied,

484 U.S. 1010 (1988). In the instant case, section 2022 does allow the plaintiff to recover lost wages and benefits from a state, but there is no "clear affirmative intent of Congress to waive the sovereign's immunity" regarding prejudgment interest. Library of Congress v. Shaw, 478 U.S. at 321. This Court concludes that the Eleventh Amendment does provide the Commonwealth with immunity from suit for prejudgment interest under the Act.

III. CONCLUSION

The Plaintiff's Motion for Summary Judgment seeking an award of prejudgment interest is DENIED. The Commonwealth's Cross-Motion for Summary Judgment is GRANTED.

It is So Ordered.

S/ Frank H. Freedman
Chief United States
District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

EARL J. REOPELL, Plaintiff, v. COMMONWEALTH OF MASSACHUSETTS, Defendant.	)	C. A. NO. 87-0066-F

JUDGMENT IN A CIVIL CASE

/__/ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

/X/ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

JUDGMENT FOR THE DEFENDANT ON THE ISSUE OF PRE-JUDGMENT INTEREST

PURSUANT TO THE MEMORANDUM AND ORDER
OF THE COURT ENTERED THIS DATE.

September 7, 1990, Robert J. Smith, Jr.
Date Clerk
S/John C. Stuckenbruck
(By) Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

EARL J. REOPELL, Plaintiff, v. COMMONWEALTH OF MASSACHUSETTS, Defendant.	C. A. NO. 87-0066-F

JUDGMENT

The Court having granted the plaintiff's motion for summary judgment, it is hereby adjudged and ordered as follows:

1. The State Police of the Commonwealth of Massachusetts shall pay to Earl J. Reopell, Jr. $3,260.41 as lost wages resulting from plaintiff's suspension from State Police duties for

the period May 1, 1985 to May 30, 1985. Payment shall be made to Earl Reopell through the United States Department of Labor within 60 days of this judgment. The plaintiff's claims for pre-judgment interest are reserved for further adjudication.

2. The State Police shall credit plaintiff with forty (40) vacation days as of the date of this final judgment. Plaintiff shall be entitled to use the aforesaid vacation days during a two year period commencing on the date of this judgment. The scheduling of vacation shall be subject to the approval of the commanding officer of the barracks, which approval shall not be withheld unreasonably.

3. The Massachusetts State Police shall rescind and declare null and void the order that it issued to plaintiff on

or about April 19, 1985 to resign from the United States Army Reserve.

4. The Massachusetts State Police shall issue and distribute a special order within twenty (20) days of this judgment, containing the following information:

(a) The Viet Nam Era Veteran's Reemployment Rights Act, a federal statute, prohibits employers, including state agencies, from interfering with the right of employees to join federal or national guard military reserve units or otherwise deny an employee an incident or advantages of employment because of any obligations as a member in federal or national guard military reserve units.

(b) The Federal District Court for the District of Massachusetts has ruled that State Trooper Earl J. Reopell, Jr. was unlawfully disciplined by the Massachusetts State Police because he joined the United States Army Reserve.

(c) The Court also found that State Trooper Earl J. Reopell, Jr. was unlawfully ordered by the Massachusetts State Police to resign from the United States Army Reserve.

(d) The Commonwealth of Massachusetts is restoring State Trooper Earl J. Reopell, Jr. all vacation, seniority and other benefits denied to him because of his membership in the United

States Army Reserve including payment of lost wages.

(e) The Federal District Court for the District of Massachusetts has enjoined the Massachusetts State Police from disciplining employees or officers for joining the federal reserves and from ordering employees or officers to resign from the federal reserves.

5. The Massachusetts State Police shall expunge any and all references to disciplinary action taken against Trooper Earl J. Reopell, Jr., from his employment records with the Massachusetts State Police.

6. The Massachusetts State Police shall restore to Trooper Earl J. Reopell, Jr. any and all seniority

rights and other benefits to which he is entitled and which have been denied to him as a result of his membership in the United States Army Reserve.

7. The Massachusetts State Police are hereby enjoined from enforcing State Police Rule 10.83 to discipline employees or officers for joining the federal reserve or to order employees or officers to resign from the federal reserves.

S/ Frank H. Freedman
United States District
Judge

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

EARL J. REOPELL, Plaintiff, v. COMMONWEALTH OF MASSACHUSETTS, Defendant.	)	C. A. NO. 87-0066-F

MEMORANDUM AND ORDER

January 11, 1989

FREEDMAN, C.J.

I.

This case involves the application of the Veteran's Reemployment Rights Act ("VRRA"), 38 U.S.C. §§ 2021 et seq., to the Massachusetts State Police Rule regarding service in Army Reserves.

Plaintiff seeks lost wages and other benefits allegedly suffered by defendant's implementation of the State Police Rules in a manner discriminatory to his service in the Army Reserves.

The case is before the Court on defendant's objections to the Magistrate's October 7, 1988 Report and Recommendation to allow plaintiff's motion for summary judgment and deny defendant's motion for summary judgment. Having reviewed the recommendation, the Court makes the de novo determination that the Magistrate's conclusions should be adopted with certain modification as set forth below. These modifications address defendant's objections and supplement the Magistrate's analysis. This Memorandumand Order should, therefore, be read in conjunction with the Report

and Recommendation to make up the decision of the Court. See 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b); Rule 3, Rules for United States Magistrates in the United States District Court for the District of Massachusetts.

II.

There being no objection to the Magistrate's rendition of the facts, the Court hereby adopts it as follows:

This case was submitted on a joint stipulation of facts.

> Plaintiff is a United States Navy veteran and was a member of the United States Navy Ready Reserve from November 1972 to December 1974. Joint Stipulation of Facts ("Joint Stipulation"), ¶¶ 1 and 2. In November 1974 plaintiff was hired by the Massachusetts State Police and received training at the state police academy. Joint Stipulation, ¶ 4. The plaintiff, in order to devote full time to his state police academy training, allowed his enlistment in the naval reserve to expire during December

1974. Joint Stipulation, ¶ 6. Plaintiff has served as a Massachusetts state police trooper since February 1975. Joint Stipulation, ¶ 7.

At issue in this case is State Police Rule 10.83, which provides:

> Members of the Uniformed Branch [including the State Police] are prohibited from joining any federal or state military organization without permission of the Commissioner, except that the Massachusetts National Guard may be joined without written permission.

Pursuant to this regulation, in November of 1983 plaintiff requested permission from the State Police to join the United States Army Reserve. Joint Stipulation, ¶ 10. Following the advice of his superior officer, plaintiff re-submitted his request to join the United States Army Reserve by providing additional information on December 1, 1983. Joint Stipulation, ¶ 12.

Plaintiff's request was denied on December 19, 1983. Joint Stipulation, ¶ 13. Approximately one year later, in spite of the denial, plaintiff enlisted in the United States Army Reserve. Joint

Stipulation, ¶ 15.[1]

Plaintiff subsequently informed his superior officer in the Massachusetts State Police of his enlistment in the United States Army Reserve. Joint Stipulation, ¶ 17.

Plaintiff was informed by his superior officer during March of 1985 that charges had been brought against him for violation of Rule[s] 10.83 and 10.21.[2]

Plaintiff accepted the option of waiving his right to a hearing on the rules violation charges and accepted the punishment of a thirty-day suspension without pay. Joint Stipulation, ¶¶ 19 and 20. The suspension resulted in a loss of pay, including overtime, in the amount of $3,008.40; loss of sick leave in the amount of one and one quarter days; loss of vacation in

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1/ Plaintiff was assigned to the Westover Air Force Base in Chicopee, Massachusetts as a Private First Class. Joint Stipulation, ¶ 16.

2/ State Police Rule 10.21 provides: "No member of the Uniform Branch shall wilfully disobey any lawful command of any commissioned officer, non-commissioned officer, or member of the Uniform Branch senior to him."

the amount of 10 days, and a loss of seniority. Joint Stipulation, ¶ 23.

In April of 1985 plaintiff was ordered by his superior officer of the State Police to resign from the United States Army Reserve. Joint Stipulation, ¶ 21. At the request of the United States Department of Labor, this order was suspended temporarily; although it is still in effect, it continues to be stayed. Joint Stipulation, ¶¶ 24 and 25.

There are approximately 1,108 uniformed members of the Massachusetts State Police, seven of whom are members of federal military reserve units. Joint Stipulation, ¶¶ 26 and 35. All of these seven troopers were members of the federal military reserve units at the time they were hired by the state police. Joint Stipulation, ¶ 36.

Members of both the federal military reserve units and the Massachusetts National Guard are required to attend a minimum of 48 drills per year and fourteen days active duty for training per year. Joint Stipulation, ¶¶ 37 nd 38. As noted in Rule 10.83, membership in the Massachusetts National Guard is unrestricted.

In July of 1985, pursuant to Federal Army Reserve orders to

attend mandatory training sessions, plaintiff requested a leave of absence from the state police for the period of August 10th through the 24th. Joint Stipulation, ¶¶ 40 and 41. Later, on August 9, 1985 plaintiff altered his request to use his vacation leave for the August 11 through 24, 1985 training. This request was granted. Joint Stipulation, ¶ 42. Thus, plaintiff performed the mandatory annutal training exercises with his military reserve unit by using his own vacation time. Joint Stipulation, ¶ 43.

In June of 1986 plaintiff received additional orders to attend mandatory military training from June 21 to July 5, 1986 and was again granted vacation leave. Joint Stipulation, ¶ 44 and 45. Again, in August of 1987 plaintiff attended mandatory reserve unit training using vacation time. Joint Stipulation, ¶¶ 47, 48 and 49.

In April of 1987 plaintiff filed this lawsuit, claiming loss of wages and other benefits due to the defendant's violation of the Veteran's Reemployment Rights Act. See 38 U.S.C.A. §§ 2021, 2024.

Where, as here, there is no genuine issue as to any material fact, this case is ripe for summary judgment as to liability. See Fed. R. Civ. P. 56(c); see also Anderson v. Liberty Lobby, Inc., 477 U.S.

242, 247-8 (1986). Plaintiff's monetary damages may be the subject of future proceedings.

Magistrate's Report and Recommendation at 2-5.

III.

The Magistrate concluded that the State Police Rule barring "'[m]embers of the Uniform Branch . . . from joining any federal or state military organization without permission of the Commissioner . . .' conflicts directly both with the letter of the statutory prohibitions and with the spirit of broad Congressional constitutional authority to raise and support the militia." Report and Recommendation at 8. In addition to the direct conflict that the Magistrate pointed out, VRRA preempts the State Police Rule because the Rule frustrates the purpose of VRRA: "'to prevent reservists and

National Guardsmen not on active duty who must attend weekend drills or summer training from being discriminated against in employment because of their Reserve membership . . . .'" Monroe v. Standard Oil Co., 452 U.S. 549, 557 (1980) (quoting S. Rep. No. 1477, 90th Cong., 2d Sess., 1-2 (1968)) (emphasis added); see Jones v. Rath Packing Co., 430 U.S. 519 (1977) (a state law imposing labelling standards on bacon and flour which were different from federal standards held invalid because it would frustrate the Congressional purpose of providing direct comparisons for consumers); City of Burbank v. Lockheed Terminal, Inc., 411 U.S. 624 (1973) (state statute imposing airport curfew held preempted because it inhibited the purpose of federal law, hindering flexibility useful in

controlling air traffic flow); see; e.g., Jennings v. Illinois Office of Education, 589 F. Supp. 935, 944 (7th Cir.), cert. denied, 441 U.S. 967 (1979) (holding that VRRA "preempts state law in view of 'Congress' explicit design for uniform enforcement among the States [in section 2022] . . . .'" Citation omitted). Given the pre-eminent status of federal law in this instance, the controlling question is whether plaintiff was deprived of the enjoyment of any "incident or advantage of employment for reasons causally related to the employee's reserve obligations." Carlson v. New Hampshire Department of Safety, 609 F.2d 1024, 1027 (1st Cir. 1979) (emphasis in original).

There is no question that defendant imposed a thirty-day suspension upon plaintiff for his violation of the Rule

requiring that he obtain the Commissioner's permission before joining his reserve unit. State Police Rule 10.83. This suspension was unequivocally causally related to plaintiff's reserve obligations. Defendant propounds clever obfuscation of this fact, arguing that plaintiff was not suspended directly for violating the permission requirement in Rule 10.83, but instead for committing an act of insubordination as defined under Rule 10.21 by joining the reserve unit before obtaining Rule 10.83 permission. Defendant also maintains that because plaintiff allowed the suspension to stand without taking advantage of the prescribed appeal process, plaintiff should be precluded from challenging his suspension in this Court. However, the question is not whether plaintiff was

afforded due process or exhausted his administrative remedies or rolled over and played dead rather than perform an exercise in futility in the face of intractable bureaucracy. Instead, the legality of the Rule inhibiting military service is at issue. The fact that this Rule was the basis for suspension only goes to linking wrongdoing to injury. For these reasons, defendant's waiver and estoppel arguments are inapplicable.

Defendant also objects to the Magistrate's conclusion that plaintiff's requests for leave were reasonable. The "rule of reasonableness" was founded in Lee v. City of Pensacola, 634 F.2d 886, 888-890 (1981). The Lee court dealt with a situation where a National Guard member/police officer attempted to get additional leave beyond the time the police department had originally

allowed. Specifically, the court found that:

> [F]or several weeks prior to his application for an extension of the leave for an additional four months, Lee was negotiating with his military superiors to ascertain whether they would extend his period of training beyond the original leave which he had requested and obtained. Yet he had no communication with the police department to indicate that he was seeking such extension of his training period. He waited until he received actual orders amending the original training orders before he communicated with the police department . . . . [H]e did not even then undertake to discuss with his employer the opportunities which were available to him, but simply stated that he intended to continue his absence from his civilian duties. He completely ignored the difficulties faced by the City in carrying out its important police duties.

Lee, 634 F.2d at 889; Gulf States Paper Corp. v. Ingram, 811 F.2d 1464, 1468-69 (11th Cir. 1987) (recognizing that the Lee reasonableness gloss on the VRRA

leave requirement, 38 U.S.C. § 2024, is in essence a direction to the court to "look for conduct akin to bad faith on the employee's part . . . .").

Contrasting Lee's conduct with Reopell's demonstrates that the latter acted well within reason given the law concerning employers' obligations with regard to employees' service in the reserves. Reopell first requested permission, in accordance with Rule 10.83, to join the reserve unit. It was only after the Commissioner denied this permission that plaintiff went on and joined the reserves. See Trustees of Boston University v. NLRB, 548 F.2d 391, 393 (1st Cir. 1977) (recognizing that leeway is given to an employee's behavior especially when it is in response to the employer's unlawful behavior); see also, NLRB v. Steinerfilm, Inc., 669 F.2d 845,

852 (1st Cir. 1982) (". . . 'it is immaterial that the employee's misconduct would constitute a sufficient reason for discharge if the actual reason for discharge' is an unlawful one."). Reopell also demonstrated his appreciation for the importance of the work of the Commonwealth's police force by using his vacation time to fulfill his yearly two-week active duty training obligation with the reserves. Plaintiff acted as reasonably as possible given defendant's obstinate refusal to allow plaintiff to serve in the reserves.

Defendant also persists in its ipse dixit argument that VRRA was not meant to apply to persons who join the reserves after commencing employment. There is no such qualification in the law which applies simply to "[a]ny person who seeks or holds a [reserve]

position . . . ." 38 U.S.C. § 2021(b)(3) (emphasis added). Furthermore, defendant fails to submit any legal argument indicating that this previous enrollment requirement may be reasonably inferred. But see Chesna v. International Fueling Company, 99 Lab. Cas. (CCH) ¶ 10,640 at 20,078 (D. Mass. 1984) (plaintiff who commenced reserve service after engaging in employment allowed protection of VRRA).

Defendant's maintenance of a separate, more permissive policy for National Guardsmen further demonstrates discrimination against plaintiff in his capacity as an Army Reservist. In defense of its Rule, defendant urges the adoption of the reasoning in Hughes v. Frank, 414 F. Supp. 468, 469 (E.D.N.Y.), aff'd without opinion, 551 F.2d 300 (2d Cir. 1976), cert. denied, 430 U.S. 968

(1977). The Hughes court upheld a county police department quota limiting the number of officers who could serve in a reserve capacity to one hundred. Contra Kolkhorst v. Robinson, et al., No. JFM-86-3057, slip op. at 7 (D. Md. June 13, 1988) (striking down as unlawful under VRRA a municipal police department's one-hundred person limit on the number of officers who may be in the reserves). Unlike the Rule in the case at bar, there is no indication that the Hughes quota policy particularly discriminated against Army Reservists as opposed to National Guardsmen. In addition to the fact that the quota policy challenged in Hughes does not square with the Rule questioned here, Hughes dealt with the distinct legal question of whether the plaintiff had made out an equal protection claim. For

these reasons, the Court sees no reason to adopt the conclusion of Hughes.

The Court does not reach this decision against the Commonwealth unmindful of the need to maintain a continually strong State Police Force. However, as the Court recognized in Monroe, 452 U.S. at 565, Congress is in the best position to weigh the benefits to reservists and the military against the burden on employers including the Commonwealth. Kolkhorst, slip op. at 5-6.

IV.

For all of the foregoing reasons, the Court hereby ADOPTS the Report and Recommendation of the Magistrate insofar as it is consistent with the above-stated modifications. Accordingly, plaintiff's motion for summary judgment is ALLOWED and

defendant's motion for summary judgment is DENIED. The plaintiff's relief may be the subject of future proceedings.

It is So Ordered.

S/ Frank H. Freedman
Chief United States
District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

EARL J. REOPELL, Plaintiff, v. COMMONWEALTH OF MASSACHUSETTS, Defendant.	)	C. A. NO. 87-0066-F

REPORT AND RECOMMENDATION REGARDING CROSSMOTIONS FOR SUMMARY JUDGMENT[1/]

October 7, 1988

PONSOR, U.S.M.

I. INTRODUCTION

In this case, plaintiff Earl J. Reopell, seeks lost wages and other

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1/ This matter has been referred to the court for report and recommendation pursuant to Rule 3 of the Rules for United States Magistrates in the United States District Court for the District of Massachusetts, 28 U.S.C. § 636(b)(1)(B).

benefits suffered allegedly by reason of the defendant's violation of the Veteran's Reemployment Rights Act ("the VRRA"). 38 U.S.C.A. §§ 2021 et seq.

The fundamental issue raised by this lawsuit is whether the Commonwealth's State Police Rule 10.83, which prohibits the plaintiff -- a Massachusetts state police trooper and military veteran -- from joining the army reserves, runs afoul of the VRRA or the Constitution.

For the reasons set forth below, the court concludes that it does. Plaintiff's motion for summary judgment should therefore be allowed and the defendant's motion for summary judgment should be denied.

II. FACTUAL BACKGROUND.

This case was submitted on a joint stipulation of facts.

Plaintiff is a United States Navy Veteran and was a member of the United States Navy Ready Reserve from November 1972 to December 1974. Joint Stipulation of Facts ("Joint Stipulation"), ¶¶ 1 and 2. In November 1974 plaintiff was hired by the Massachusetts State Police and received training at the state police academy. Joint Stipulation, ¶ 4. The plaintiff, in order to devote full time to his state police academy training, allowed his enlistment in the naval reserve to expire during December 1974. Joint Stipulation, ¶ 6. Plaintiff has served as a Massachusetts state police trooper since February 1975. Joint Stipulation, ¶ 7.

At issue in this case is State Police Rule 10.83, which provides:

Members of the Uniformed Branch

> [including the State Police] are prohibited from joining any federal or state military organization without permission of the Commissioner, except that the Massachusetts National Guard may be joined without written permission.

Pursuant to this regulation, in November of 1983 plaintiff requested permission from the State Police to join the United States Army Reserve. Joint Stipulation, ¶ 10. Following the advice of his superior officer, plaintiff re-submitted his request to join the United States Army Reserve by providing additional information on December 1, 1983. Joint Stipulation, ¶ 12.

Plaintiff's request was denied on December 19, 1983. Joint Stipulation, ¶ 13. Approximately one year later, in spite of the denial, plaintiff enlisted in the United States Army Reserve.

Joint Stipulation, ¶ 15.[2/] Plaintiff subsequently informed his superior officer in the Massachusetts State Police of his enlistment in the United States Army Reserve. Joint Stipulation, ¶ 17.

Plaintiff was informed by his superior officer during March of 1985 that charges had been brought against him for violation of Rule 10.83 and 10.21.[3/] Plaintiff accepted the option of waiving his right to a hearing on the rules violation charges and accepted the punishment of a thirty-day suspension without pay. Joint

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2/ Plaintiff was assigned to the Westover Air Force Base in Chicopee, Massachusetts as a Private First Class. Joint Stipulation, ¶ 16.

3/ State Police Rule 10.21 provides: "No member of the Uniform Branch shall wilfully disobey any lawful command of any commissioned officer, non-commissioned officer, or member of the Uniform Branch senior to him."

Stipulation, ¶¶ 19 and 20. The suspension resulted in a loss of pay, including overtime, in the amount of $3,008.40; loss of sick leave in the amount of one and one quarter days; loss of vacation in the amount of 10 days, and a loss of seniority. Joint Stipulation, ¶ 23.

In April of 1985 plaintiff was ordered by his superior officer of the State Police to resign from the United States Army Reserve. Joint Stipulation, ¶ 21. At the request of the United States Department of Labor, this order was suspended temporarily; although it is still in effect, it continues to be stayed. Joint Stipulation, ¶¶ 24 and 25.

There are approximately 1,108 uniformed members of the Massachusetts State Police, seven of whom are members of federal military reserve units.

Joint Stipulation, ¶¶ 26 and 35. All of these seven troopers were members of the federal military reserve units at the time they were hired by the state police. Joint Stipulation, ¶ 36.

Members of both the federal military reserve units and the Massachusetts National Guard are required to attend a minimum of 48 drills per year and fourteen days active duty for training per year. Joint Stipulation, ¶¶ 37 and 38. As noted in Rule 10.83, membership in the Massachusetts National Guard is unrestricted.

In July of 1985, pursuant to Federal Army Reserve orders to attend mandatory training sessions, plaintiff requested a leave of absence from the state police for the period of August 10th through the 24th. Joint

Stipulation, ¶¶ 40 and 41. Later, on August 9, 1985 plaintiff altered his request to use his vacation leave for the August 11 through 24, 1985 training. This request was granted. Joint Stipulation, ¶ 42. Thus, plaintiff performed the mandatory annual training exercises with his military reserve unit by using his own vacation time. Joint Stipulation, ¶ 43.

In June of 1986 plaintiff received additional orders to attend mandatory military training from June 21 to July 5, 1986 and was again granted vacation leave. Joint Stipulation, ¶ 44 and 45. Again, in August of 1987 plaintiff attended mandatory reserve unit training using vacation time. Joint Stipulation ¶¶ 47, 48 and 49.

In April of 1987 plaintiff filed this lawsuit, claiming loss of wages and

other benefits due to the defendant's violation of the Veteran's Reemployment Rights Act. See 38 U.S.C.A. §§ 2021, 2024.

Where, as here, there is no genuine issue as to any material fact, this case is ripe for summary judgment as to liability. See Fed. R. Civ. P. 56(c); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-8 (1986). Plaintiff's monetary damages may be the subject of future proceedings.

III. DISCUSSION

A. Statutory Background.

The plaintiff contends that State Police Rule 10.83 contravenes the VRRA. 38 U.S.C.A. § 2024(d) requires that an employer provide a leave of absence to any military reservist in its employ, so that the reservist may participate in military training. The statute also

requires that an employer permit a reservist to return to work without loss of status or benefits. See 38 U.S.C.A. § 2024(d).

These provisions of the VRRA are "consistent with Congress' declaration that 'the support of employers and supervisors in granting employees a leave of absence from their jobs to participate in military training without detriment to earned vacation time, promotions, and job benefits is essential to the maintenance of a strong Guard and Reserve force.'" Kolkhorst v. Robinson, C.A. No. JFM-86-3057, slip op. at 4 (D. Md. June 13, 1988) quoting Act of May 2, 1986, Pub. L. No. 99-290, Section 1(a)(3), 100 Stat. 413; see Monroe v. Standard Oil Co., 452 U.S. 549 (1981).

Additionally, 38 U.S.C.A. § 2021(b)(3) states:

> Any person who seeks or holds a position described in clause (A) or (B) of subsection (a) of this section shall not be denied hiring, retention in employment, or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the armed forces.

"Public employees [such as the plaintiff] come within the purview of Section 2024(d) . . ." Kolkhorst v. Robinson, C.A. No. JFM-86-3057, slip op. at 4 (D. Md. June 13, 1988).

A portion of the legislative history for the VRRA entitled "Reaffirmation of Recognition of National Guard and Reserve Forces" states that:

> (a) Findings. -- The Congress reaffirms its finding set out in section 1130(a) of public law 97-252 that

(2) attracting and retaining sufficient numbers of qualified persons to serve in the Guard and Reserve is a difficult challenge during a period in which there is a decreasing number of young people from which to recruit;

(3) the support of employers and supervisors in granting employees a leave of absence from their jobs to participate in military training without detriment to earned vacation time, promotions, and job benefits is essential to the maintenance of a strong Guard and Reserve force.

Pub. L. 99-290, § 1,100 Stat. 413 (May 2, 1986) (emphasis supplied). This legislative history is consistent with the plaintiff's assertion that the provisions of the VRRA are extended to protect employees who volunteer for service in addition to those already enlisted.

B. Constitutional and Case Law Analysis.

The statutory support for plaintiff's position is powerfully undergirded by Constitutional

considerations.[4/] The Constitution provides that Congress shall have the authority to "raise and support armies . . ." Const. Art. 1, ¶ 8, cl. 12. The Constitution also provides that Congress shall have the power "to provide for calling forth the militia to execute laws . . ."; Const. Art. 1, ¶ 8, cl. 15; and "to provide for organizing, arming and disciplining the militia, and for governing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States . . . ." Const.

4/ This is not a case, contrary to the plaintiff's suggestion, that can be decided without reference to constitutional questions. A plain reading of Rule 10.83 dictates the finding that permission of the commissioner is necessary to join any military organization other than the Massachusetts National Guard. Mere notice is insufficient.

Art. 1, ¶ 8, cl. 16. "Congress' broad constitutional power to raise and regulate armies" has been recognized by the Supreme Court. Rostker v. Goldberg, 453 U.S. 57, 65 (1981), quoting Schlesinger v. Ballard, 419 U.S. 498, 510 (1975).

These constitutional provisions have supported district courts in forbidding employers from interfering with reservists' performance of military duties.

In Chesna v. International Fueling Company, Judge Keeton held that an employee who enlisted in the Naval Reserve and was discharged after notifying the defendant employer of his need to attend required drills one weekend per month was entitled to damages. 99 Lab. Cas. ¶ 10,640, p. 20,078 (D. Mass. 1984).

Significantly, the Chesna holding applied the protections of the VRRA to an individual who joined the reserves during employment. Chesna damages the defendant's argument that the VRRA only protects persons who are already reservists at the time of their hiring.

In a recent case from Maryland, the District Court held that a Baltimore City Police Department Rule limiting to one hundred persons the number of officers who could be active reservists was unlawful. Kolkhorst v. Robinson, et al., No. JFM-86-3057, slip op. at 7 (D. Md. June 13, 1988).

> [A]lthough the Department is entitled to receive adequate notice that an officer intends to join the active reserve, it can not require by General Order or otherwise that its prior approval for that action be obtained.

Id.

In summary, on its face, the State Police Rule 10.83 which prohibits "[m]embers of the Uniformed Branch . . . from joining any federal or state military organization without permission of the Commissioner . . ." conflicts directly both with the letter of the statutory prohibitions and with the spirit of broad Congressional constitutional authority to raise and support the militia.

Furthermore, as noted, it seems obvious that the intent behind the Veteran's Reemployment Rights Act is to protect both persons who become members of the Reserves after hiring and those who are already reservists when first employed. Any other conclusion would shred the shield provided by the statute. The viability of the whole reserve concept, which depends upon

citizen volunteer participation, would be severely undermined if potential reservists knew they could be hammered by their existing employers if they chose to join.

In response to these considerations favoring the plaintiff, defendant offers several strong, but ultimately unavailing, arguments.

First, and perhaps most vigorously, the defendant argues that the statutory provisions of the VRRA apply only to actual reservists, not civilians seeking to enter the reserves. Therefore, State Police Rule 10.83, according to the defendant, is not preempted by the federal litigation.

This preemption argument rests upon the assertion that 38 U.S.C.A. § 2021(b)(3) does not grant the plaintiff the right to join the reserves

but rather protects only those already in service. Pointing out that the statute does not directly address existing employees wishing to join the reserve, the defendant contends that this court should favor the presumption against preemption. See, generally, Tribe, American Constitutional Law 479-480 (2d ed. 1988).

To the contrary, however, both common sense and legislative history -- as noted above -- demonstrate that the statutory provisions of the VRRA were enacted with the purpose of encouraging civilians to enter the reserves. See Pub. L. 99-290, § 1, 100 Stat. 413 (May 2, 1986) (quoted, infra, p. 6).

Additionally, case law indicates that the statutory provisions apply both when a civilian volunteers for the reserves during employment and when a

reservist volunteers for training. See Chesna v. International Fueling Company, 99 Lab. Cas. ¶ 10,640, p. 20,078 (D. Mass. 1984); see also Kolkhorst v. Robinson, et al., No. JFM-86-3057, slip op. at 4 (D. Md. June 13, 1988), citing Gulf States Paper Corp. v. Ingram, 811 F.2d 1464, 1469 (11th Cir. 1987); Lee v. City of Pensacola, 634 F.2d 886, 889 (5th Cir. 1981); Bottger v. Doss Aeronautical Services, Inc., 609 F. Supp. 583, 586 (M.D. Ala. 1985).

Although the defendant attempts to distinguish the Chesna holding on the grounds that in Chesna no state rule violation was involved and the employee did not work for a paramilitary organization, such attempts are unpersuasive. As noted above, the Chesna holding applied the statutory provisions of the VRRA to an individual

who joined the reserves during employment. The type of employment affected should not be significant.

Next, the defendant argues that the plaintiff waived challenges to the state rule because he waived his right to a disciplinary hearing with appellate rights. Having failed to utilize these avenues of relief, the defendant asserts that the plaintiff cannot now claim, or is estopped from claiming, that Rule 10.83 is not a lawful command. This court disagrees. Although the plaintiff did sign a waiver and agreed to accept the 30-day suspension, the order directing him to resign from the reserve unit is still in effect. The order has been stayed temporarily, and the plaintiff has been using his own accrued vacation time in order to meet the training and duty requirements of the

reserve. Although there were alternatives that plaintiff did not pursue, such as seeking declaratory judgment or pursuing a disciplinary hearing and appellate review, the constitutional and statutory issues here are momentous and this is not an appropriate case for estoppel. It would be unfair at this juncture to rule that because the plaintiff accepted the 30-day suspension, he waived his rights to pursue this cause of action.

Nor does the plaintiff's behavior in this case reach the level of the plaintiff's misconduct in Hilliard v. N.J. Army Nat'l Guard, 527 F. Supp. 405 (D.N.J. 1981). There, plaintiff Hilliard set up a phony corporation which he listed as his employer in order to avoid having to get permission from his real employer -- the Teaneck New

Jersey police department -- before reporting for National Guard training. The court concluded that this intentional misrepresentation dirtied Hilliard's hands. 527 F. Supp. at 411. Nothing in the plaintiff's conduct in this case approaches Hilliard's shenanigans.

The defendant also argues that the plaintiff's requests for leave were unreasonable. See Gulf States Paper Corp. v. Ingram, 811 F.2d 1464 (11th Cir. 1987); Lee v. City of Pensacola, 634 F.2d 886, (5th Cir. 1981). The defendant bases its argument on the fact that the plaintiff's conduct was in direct contravention of police orders. But, it is the whole question of permission which is properly raised by the lawsuit. Plaintiff's actions provided the necessary factual

foundation for the complaint. His misconduct, if any, was not serious enough to bar his resort to this court.

Lastly, the defendant urges this court to follow the opinion in Hughes v. Frank, 414 F. Supp. 468, 469 (E.D.N.Y.), aff'd. without opinion, 551 F.2d 300 (2nd Cir. 1976), cert. denied 430 U.S. 968 (1977). In the Hughes case the court upheld a county police department rule which provided that:

> A member of the Force or Department is prohibited from affiliating with any organization or body, the constitution or regulations of which would in any way exact prior consideration, and prevent him from performing his departmental duties; and he shall immediately advise the Commissioner of Police of any change in his classification in relation to Selective Service, or status concerning his membership in any Federal or State military organization or reserve program.

Hughes v. Frank, 414 F. Supp. at 469.

In Hughes it was the policy of the police department to adhere to a quota allowing one hundred officers to participate in the reserves. Id. There as here,

> [b]efore a police officer may join a military reserve unit, he must obtain the permission of the police commissioner. An officer's affiliation without such approval could result in charges being brought against him for violating police department rules and regulations.

Id.

In Hughes v. Frank, evidence was submitted that the county suffered a substantial loss of services as a result of the time each reservist spent on reserve duty.[5/] In the present case,

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5/ It was calculated that out of approximately 3800 officers, with 100 officers on reserve Nassau County lost 3,000 days of police services per year, equivalent to a 15% reduction in the

(footnote continued)

there is no such quota and, furthermore, the defendants cannot make a viable claim of suffering such a loss of police power because Rule 10.83 explicitly provides no restriction upon police troopers wishing to join the Massachusetts National Guard. As noted above, the time and training requirements of the Massachusetts National Guard are identical to those of the federal reserve units. Joint Stipulation, ¶¶ 37 and 38. The Massachusetts state police "has not established any guidelines to determine the number of members of the uniformed

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(footnote continued)

force at a yearly cost of $400,000. The court also took into consideration the tight fiscal situation and the hiring freeze in effect at the time of this decision preventing temporary officers from being hired to fill the gap. Id.

branch who would be allowed to join military reserve units." Joint Stipulation, ¶ 39.

Considering their somewhat different facts, this court concludes that the Hughes decision is of little precedential value. To the extent that it is apposite, this court finds the decision unpersuasive. This court is far more persuaded by the reasoning of the recent Kolkhorst decision. No. JFM-86-3057, slip op. (D. Md. June 13, 1988).

IV. CONCLUSION.

In conclusion, for the aforementioned reasons, this court recommends that the plaintiff's Motion for Summary Judgment be GRANTED and that the defendant's Cross-motion for Summary

Judgment be DENIED.[6/]

S/ Michael A. Ponsor

MICHAEL A. PONSOR

U.S. Magistrate

6/ The parties are hereby advised that under the provisions of Rule 3(b) of the Rules for United States Magistrates in the United States District Court for the District of Massachusetts, any party who objects to these findings and recommendations must file a written objection thereto with the Clerk of this court within ten (10) days of the party's receipt of this Report and Recommendation. The written objection must specifically identify the portion of the proposed findings or recommendations to which objection is made and the basis for such objection. The parties are further advised that failure to comply with this rule shall preclude further appellate review by the Court of Appeals of the District Court order entered pursuant to this Report and Recommendation. See U.S. v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir 1986); U.S. v. Vega, 678 F2d 376, 378-79 (1st Cir. 1982). See also, Thomas v. Arn, 474 U.S. 140, 154-55 (1985).

No. 91-179

In the Supreme Court of the United States

OCTOBER TERM, 1991

COMMONWEALTH OF MASSACHUSETTS, PETITIONER

v.

EARL J. REOPELL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a member of the United States Army Reserve whose state employer unlawfully suspended him from duty, in violation of the Veterans' Reemployment Rights Act, 38 U.S.C. 2022, may be awarded prejudgment interest "to compensate [him] for any loss of wages or benefits suffered by reason of such employer's unlawful action."

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-479

COMMONWEALTH OF MASSACHUSETTS, PETITIONER

v.

EARL J. REOPELL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. A1-A26, is reported at 936 F.2d 12. The opinions of the district court, Pet. App. B1-B7, C1-C6, D1-D19, E1-E27, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1991. A petition for a writ of certiorari was filed on September 16, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

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[1] Although petitioner cites 28 U.S.C. 1257, Pet. 3, this Court's jurisdiction is properly invoked under 28 U.S.C. 1254(1).

STATEMENT

The facts of this case are undisputed. In 1984, respondent, a State Police Trooper employed by petitioner, enlisted in the United States Army Reserve without petitioner's permission. Respondent was accordingly suspended from his employment for 30 days without pay. Pet. App. A4. He brought this action in the United States District Court for the District of Massachusetts under the Veterans' Reemployment Rights Act (VRRA), 38 U.S.C. 2021, *et seq.*[2] The VRRA provides in relevant part that a state employee, such as respondent, "shall not be denied * * * any * * * incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces." 38 U.S.C. 2021(b)(3). If an employer, "who is a private employer or a State or political subdivision thereof," violates Section 2021(b)(3), the district court is authorized to order that employer "to compensate [the covered] person for any loss of wages or benefits suffered by reason of such employer's unlawful action." 38 U.S.C. 2022.

The district court found that the suspension of respondent violated the VRRA, and petitioner does not contest that finding in this Court. The court awarded respondent $3,260.41 in lost wages under the Act, and the parties stipulated that the only remaining issue was the availability of prejudgment interest on the backpay award.[3] On cross-motions for summary

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[2] Pursuant to 38 U.S.C. 2022, the United States Attorney for the District of Massachusetts represented respondent in his action.

[3] The parties stipulated that if interest were payable, the amount due as of February 28, 1990, would be $1,788.01, and further interest would accrue at a rate of 8% thereafter. Pet. App. B2.

judgment, the district court held that the Eleventh Amendment barred an award of interest against petitioner. Pet. App. B2-B7.

The court of appeals reversed. In reliance on this Court's decision in *Missouri* v. *Jenkins*, 491 U.S. 274 (1989), the court of appeals concluded that there was no "strict requirement that prejudgment interest" must be "*expressly* sanctioned by Congress" before a plaintiff may recover it from a State pursuant to a federal statute that unmistakenly abrogates the State's Eleventh Amendment immunity against a compensatory award. Pet. App. A14. Rather, once Congress has unequivocally abrogated Eleventh Amendment immunity from a suit for compensatory relief, the question whether interest is includable is one of statutory construction. Pet. App. A15. The court of appeals acknowledged that this Court has recognized a special "no-interest rule" in suits against the federal government, *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986), which reflects a long standing presumption that Congress does not intend to permit recovery of interest against the federal government absent an express provision to the contrary. The court of appeals rejected petitioner's claim that the presumption is applicable to the interpretation of federal laws abrogating the sovereign immunity of States. The court reached this result in reliance on this Court's statement in *Missouri* v. *Jenkins*, 491 U.S. at 281 n.3, that the rule of construction in issue applies only to suits against the United States. Pet. App. A13.

The court next determined that Congress intended the VRRA to authorize awards of prejudgment interest against the States, as an element of the compensatory relief. Noting that the Act requires employers—

specifically including the States—to "compensate" injured employees "for any loss of wages or benefits" sustained in consequence of a violation of the VRRA, the court held that full compensation for lost wages would require the payment of interest. Pet. App. A20. The court added that courts have consistently interpreted the VRRA to provide for interest awards against private employers, and that Congress extended the remedial provisions of Section 2022 to state employers on the same terms as they applied to private employers. Pet. App. A22-A24.

DISCUSSION

The opinion of the court of appeals is correct and consistent with the decisions of other courts of appeals and of this Court. Further review is therefore unwarranted.

1. The governing principles are not in dispute. Because respondent sought retrospective monetary relief for the petitioner's violation of his rights, this case directly implicates the Eleventh Amendment. Absent a waiver of sovereign immunity by petitioner, therefore, respondent may maintain this action in federal court only if Congress abrogated petitioner's sovereign immunity "by making its intention unmistakably clear in the language of the statute." *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 242 (1985); see, *e.g.*, *Dellmuth* v. *Muth*, 491 U.S. 223, 228 (1989).

The VRRA effects such a waiver. The Act originated with Congress's determination that one "who was called to the colors [is] not to be penalized on his return by reason of his absence from his civilian job." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284 (1946). The statute forbids, as well,

an employer's imposition of penalties upon those who, like respondent, choose to serve the United States in the armed forces reserves. 38 U.S.C. 2021(b)(3); see *Monroe* v. *Standard Oil Co.*, 452 U.S. 549, 556-560 (1981). To implement those guarantees, the VRRA, which "is to be liberally construed for the benefit of those who [leave] private life to serve their country," *Fishgold*, 328 U.S. at 285, has from its earliest form authorized the federal courts to order the Act's violators to "compensate [a covered] person for any loss of wages or benefits suffered by reason of [an] employer's unlawful action." Selective Training and Service Act of 1940, ch. 720, § 8(c), 54 Stat. 885, 891.

Prejudgment interest on lost wages comprises one element of the compensatory remedy. As this Court has explained in other contexts, "[p]rejudgment interest serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress." *West Virginia* v. *United States*, 479 U.S. 305, 310-311 n.2 (1987); accord *General Motors Corp.* v. *Devex Corp.*, 461 U.S. 648, 654 (1983). Indeed, referring to the backpay award authorized by Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(g)—relief that is closely analogous to the compensation for lost wages authorized by the VRRA—this Court has expressly recognized that "[p]rejudgement interest, of course, is 'an element of complete compensation.'" *Loeffler* v. *Frank*, 486 U.S. 549, 558 (1988). In the context of the VRRA, the courts of appeals have considered prejudgment interest so central to the Act's compensatory purpose that they have found it an abuse of dis-

cretion to deny such interest, even when the employer has acted in good faith. See, *e.g.*, *Hanna* v. *American Motors Corp.*, 724 F.2d 1300, 1311 (7th Cir.), cert. denied, 467 U.S. 1241 (1984); *Hembree* v. *Georgia Power Co.*, 637 F.2d 423, 429-30 (5th Cir. 1981).

In 1974, Congress extended the Act to state employers, Pub. L. No. 93-508, § 404(a), 88 Stat. 1478, 1596, and, in so doing, abrogated state sovereign immunity by unequivocally clear language. The VRRA now reads in relevant part as follows:

> If any employer, *who is a private employer or a State or political subdivision thereof*, fails or refuses to comply with the provisions of [the Act], the [appropriate] district court of the United States * * * shall have the power * * * specifically to require such employer * * * *to compensate* [*a covered*] *person for any loss of wages or benefits* suffered by reason of such employer's unlawful action.

38 U.S.C. 2022 (emphasis added). Petitioner does not dispute that the foregoing provision abrogates state sovereign immunity, and extends the district court's authority to award backpay as make-whole relief against the States. Rather, petitioner argues that Congress stopped short of extending the district court's authority to award prejudgment interest as part of the complete compensation for lost wages.

That contention, however, is not supported by the statutory language. The Act draws no distinction between private and state employers for purposes of the remedial provisions of Section 2022, but subjects "any employer, who is a private employer or a State or political subdivision thereof," to the full panoply of available remedies. It is not surprising, therefore,

that lower courts have routinely awarded prejudgment interest against state government employers under the Act. See, *e.g.*, *Jennings* v. *Illinois Office of Educ.*, 589 F.2d 935, 937 (7th Cir.), cert. denied, 441 U.S. 967 (1979); *Peel* v. *Florida Dep't of Transp.*, 500 F. Supp. 526, 528 (N.D. Fla. 1980). As petitioner concedes, moreover, the holding of the present case is uncontradicted by the decision of any other court of appeals. Pet. 15 n.6.

The legislative history of the 1974 amendment confirms that States are to be subject to the same remedies as private employers under the VRRA. In discussing 38 U.S.C. 2022, the Senate Report noted that the 1974 amendment "extends to employees of State * * * governments * * * enforcement rights *in the same manner and to the same extent as* are currently provided for employees of private employers." S. Rep. No. 907, 93d Cong., 2d Sess. 111 (1974) (emphasis added). That report also explained that Congress sought to extend "full coverage to veterans who were employed by States and their political subdivisions." *Id.* at 109. Hence, that amendment is properly understood to subject the States to the district court's remedial power to award full compensation for lost wages, including prejudgment interest, under the VRRA.

2. Petitioner seeks to avoid the VRRA's authorization of prejudgment interest by extending to federal statutes abrogating *state* sovereign immunity this Court's presumption that Congress does not intend to subject the *federal* government to an award of interest, absent express references to interest. That contention also does not warrant review.

a. The special "no-interest rule" recently reaffirmed by this Court in *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986), does not apply to congression-

ally created remedies against state governments. As this Court made clear in *Missouri* v. *Jenkins*, *supra*, the "special no-interest rule" is "applicable to the immunity of the United States and * * * provides an 'added gloss of strictness' * * * only where the United States' liability for interest is at issue." 491 U.S. at 281 n.3.

While petitioner argues that the relevant passage from *Missouri* v. *Jenkins* was dictum, Pet. 21, that characterization is incorrect. In that case, the State resisted the inclusion of an interest component in an award of attorney's fees assessed against it as "costs." Relying on *Shaw*, 478 U.S. at 321, the State argued that interest was not a component of costs. *Missouri* v. *Jenkins*, 491 U.S. at 281 n.3. This Court responded that its observation in *Shaw* that interest was not an element of costs could properly be understood only in the context of the no-interest rule, which applied only to the federal government, and not the States. *Ibid.* Hence, the distinction between the federal, and a state, government for purposes of the no-interest rule, was necessary to respond to an argument, the success of which would have dictated a contrary result in *Missouri* v. *Jenkins*.

In any case, the distinction drawn in *Jenkins* ~~Court~~ between the applicability of the no-interest rule to congressional waivers of federal, as opposed to state, sovereign immunity is correct. The federal no-interest rule, as such, dates back to at least 1819 and appears in numerous decisions of this Court starting in 1879. See *Shaw*, 478 U.S. at 315-317. In view of that lengthy history, "[w]hen Congress has intended to waive the United States' immunity with respect to interest, it has done so expressly; thus, waivers of sovereign immunity to suit must be read against the

backdrop of the no-interest rule."[4] *Id.* at 318-319; accord *United States ex rel. Angarica* v. *Bayard*, 127 U.S. 251, 260 (1888) ("Congress, though well knowing the [no-interest] rule observed at the Treasury, and frequently invited to change it, has refused to pass any general law for the allowance and payment of interest on claims against the government."). Petitioner has not cited, and we are unaware of, any traditional no-interest rule that applies to congressional legislation concerning the immunity of the States. See *Missouri* v. *Jenkins*, 491 U.S. at 281 n.3 (rejecting the asserted "existence of an equivalent rule relating to State immunity that embodies the same ultrastrict rule of construction for interest awards that has grown up around the federal no-interest rule").

b. Consistent with the distinction drawn by *Missouri* v. *Jenkins*, the decisions of the lower courts have routinely awarded interest under federal statutes that authorize compensatory relief against the States, even though the statutes do not expressly state

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[4] Because of the no-interest rule, statutes—such as the VRRA, 38 U.S.C. 2023(a)—that simply authorize compensatory relief against the federal government do not thereby authorize prejudgment interest as an element of complete compensation. See, *e.g.*, *United States* v. *Tillamooks*, 341 U.S. 48, 49 (1951) (no waiver of federal immunity against interest found in congressional authorization to recover "just compensation"); *Tillson* v. *United States*, 100 U.S. 43, 45, 47 (1879) (interest award against the federal government not authorized by statute establishing liability for the "amount equitably due"). Rather, Congress must explicitly and separately specify the availability of prejudgment interest. See, *e.g.*, *Shaw*, 478 U.S. at 314-317.

that interest is available.[5] See, *e.g.*, *Whiting* v. *Jackson State University*, 616 F.2d 116, 127 n.8 (5th Cir. 1980) (Title VII); *Jennings*, 589 F.2d at 937 (VRRA); *Gelof* v. *Papineau*, 648 F. Supp. 912, 929-931 (D. Del. 1986) (Age Discrimination in Employment Act), vacated on other grounds, 829 F.2d 452 (3d Cir. 1987); *Peel*, 500 F. Supp. at 528 (VRRA).

In addition to the decision in this case, moreover, recent decisions of two other courts of appeals have expressly considered and rejected the claim, advanced by petitioner here, that *Shaw*'s no-interest rule requires Congress to authorize interest against the States explicitly and separately from the authorization to sue the States for compensatory relief. See *Pegues* v. *Mississippi State Employment Service*, 899 F.2d 1449, 1453-1454 (5th Cir. 1990); *Jenkins* v. *Missouri*, 838 F.2d 260, 265 (8th Cir. 1988), aff'd on other grounds, 491 U.S. 274 (1989). Thus, as petitioner concedes, Pet. 15 n.6, there is no split in authority on the applicability, *vel non*, of the no-interest rule to congressional abrogations of Eleventh Amendment immunity. Further review is unwarranted.

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[5] Prior to *Missouri* v. *Jenkins*, the First Circuit had extended the federal no-interest rule of *Shaw* to cases involving Eleventh Amendment immunity. See *Rogers* v. *Okin*, 821 F.2d 22, 26-28 (1987), cert. denied, 484 U.S. 1010 (1988). In the present case, the First Circuit abandoned that approach in reliance on *Jenkins*. Pet. App. A11-A14.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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